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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions of the	)	
Telecommunications Act of 1996	)	
	)	

COMMENTS OF

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

Carol Ann Bischoff
Executive Vice President
and General Counsel
Jonathan D. Lee
Vice President, Regulatory Affairs
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Robert J. Aamoth
Todd D. Daubert
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

Dated: April 5, 2001

SUMMARY

The time has come to lift the illegal restrictions on the use of EELs that the Commission imposed in the *Supplemental Order* and extended in the *Supplemental Order Clarification*. Since issuing the *UNE Remand Order*, the Commission has charted a tortuous path towards ever more complicated use restrictions on EELs with increasingly vague and remote policy justifications. The Commission took this path despite the fact that use restrictions violate the plain and unambiguous language of the 1996 Act, as the Commission itself has repeatedly recognized.

Time has proven the wisdom of Congress's decision not to tolerate any type of restriction on the use of UNEs. In the 18 months since the Commission imposed the use restrictions, EELs have largely been unavailable to competing carriers for ***any*** services, despite the fact that the Commission intended to restrict the use of EELs only in certain situations. Requesting carriers, including those that carry a "significant amount of local exchange traffic," have been forced to order EEL-equivalent services (*e.g.*, T1 loops, multiplexing and transport) out of the ILECs' tariffs as higher-priced special access services.

There is absolutely no rational public policy basis for imposing restrictions on the use of EELs. The use restrictions are not necessary to protect universal service, because there are no universal service support subsidies in special access (or even switched access) rates. The only effect of the use restrictions is to guarantee the ILECs a certain revenue stream from their tariffed special access services. However, protecting ILEC revenues is not a permissible policy objective for the Commission. The goal of the Commission must be to promote competition, not to protect incumbent monopoly profit streams.

The use restrictions are also fundamentally inconsistent with the Commission's application of the impair standard, as well as its competitive policies. Those restrictions not only have decreased the speed with which competition is introduced and reduced certainty in all markets due to disputes about whether a competitive carrier meets the qualifications, but also have emboldened ILECs to refuse to provide EELs to ***any*** requesting carriers. Accordingly, few carriers have been able to integrate EELs into their business plans, even if they provide a "significant amount of local exchange service," and entry is delayed because carriers do not have accurate information about the availability of EELs. Moreover, the illegal use restrictions interfere with facilities-based competition because they generate inefficient entry and investments decisions. In any event, the illegal use restrictions are simply not practical from an administrative standpoint because they focus on factors that are beyond the ability of the requesting carrier (and for some options, even the customer) to control or know.

In the end, the losers under the illegal use restrictions are consumers, many of whom are still waiting to see any benefits from the market-opening provisions of the Telecommunications Act of 1996. In fact, the only winners under the illegal use restrictions are ILECs, whose supra-competitive special access prices and monopoly profit stream continue to be shielded from competitive forces by a Commission umbrella, as they have been for over five years. Therefore, the Commission should return immediately to the path charted by Congress when it adopted Section 251 of the 1996 Act – restrictions on the use of UNEs are strictly forbidden – by immediately lifting the use restrictions it imposed on an "interim" basis in the *Supplemental Order* and extended indefinitely in the *Supplemental Order Clarification.*

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To: The Commission

COMMENTS OF
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments in response to the Commission's *Public Notice* in the above-captioned proceeding.[1] CompTel is the premier industry association representing competitive telecommunications providers and their suppliers. CompTel's members provide local, long distance, international, Internet and enhanced services throughout the nation. It is CompTel's fundamental policy mandate to see that competitive opportunity is maximized for *all* its members, both today and in the future.

CompTel has long supported the ability of requesting carriers under Section 251 of the Communications Act to use unbundled network elements ("UNEs"), individually and in combinations, without restrictions on the types of services that may be provided. In this

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[1] *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, CC Docket No. 96-98, Public Notice, DA 01-169 (rel. Jan. 24, 2001) ("*Notice*"). *See also Common Carrier Bureau Grants Motion for Limited Extension of Time for Filing Comments and Reply Comments on the Use of Unbundled Network Elements to Provide Exchange Access Service,* CC Docket No. 96-98, Public Notice, DA 01-501 (rel. Feb. 23, 2001) (extending filing dates for comments to April 5, 2001 and for reply comments to April 30, 2001).

proceeding, CompTel has strongly supported the UNE combination of loop, multiplexing, and transport – known as the enhanced extended loop ("EEL") – as an important tool for bringing competition to consumers. However, most incumbent local exchange carriers ("ILECs") have refused for more than five years to provide EELs as required by the statute, and local competition has been thwarted as a result. Unfortunately, the Commission shares some of the fault for this unfortunate state of affairs, because it first looked the other way while ILECs refused to provide EELs and then issued a series of orders imposing ever more complicated "interim" use restrictions on EELs. Those restrictions are patently contrary to the statutory language and the Commission's own rules, and they should be removed immediately.

The wisdom of Congress' approach to UNEs – tolerating no use restrictions on UNEs of any kind whatsoever – has been abundantly proved by recent experience with the Commission's interim restrictions. Although the Commission intended to restrict the use of EELs only for certain services, the result has been that EELs have largely been unavailable to competing local carriers for ***any*** services. Requesting carriers have been forced to order EEL-equivalent services (*e.g.*, T1 loops, multiplexing and transport) out of the ILECs' tariffs as higher-priced special access services. The beneficiaries of these rules have been the ILECs, whose supra-competitive special access prices and monopoly profit stream have been shielded by a Commission umbrella from competitive forces and market entry for more than five years. The losers under these rules are consumers, many of whom are still waiting to see any benefits from the market-opening provisions in Section 251 of the Telecommunications Act of 1996.

During the debates on EELs that led to the *Supplemental Order* and *Supplemental Order Clarification*, the ILECs fooled the Commission, the public and, regrettably, a few CLECs through assurances that they would readily convert special access circuits to EELs so long as the

Commission adopted interim restrictions to prevent a reduction in their special access revenues through EEL conversions by long distance carriers. Based on these assurances, the Commission adopted the requested use restrictions, claiming that the restrictions were "interim" in nature and necessary to protect universal service subsidies. Time has proven both that the ILECs have no intention of providing EELs in a timely and cost effective manner and that the "interim" restrictions do not protect universal service subsidies. The only purpose served by these restrictions is to protect a monopoly revenue stream of the ILECs from being eroded by the market-opening provisions in Section 251. However, the goal of the Commission must be "to promote competition . . . , not to protect competitors."[2] Therefore, the time has come to lift these illegal use restrictions entirely before they do even more damage to competition than they have already done.

BACKGROUND

In the *UNE Remand Order*, the Commission reaffirmed its previous conclusion in the *Local Competition First Report and Order* that Section 251(c)(3) entitles a requesting carrier to use a UNE, or UNE combination, to provide any telecommunications service it seeks to offer.[3] Finding the statutory language "unambiguous," the Commission agreed that the Act does not permit restrictions on a requesting carrier's access to or use of network elements.[4] Accordingly, the Commission reaffirmed Section 51.309 of its Rules, which prohibits ILEC use restrictions.[5]

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2 *CompTel v. FCC*, 87 F.3d 522, 530 (D.C. Cir. 1996), *quoting WATS-Related and Other Amendments of Part 69 of the Commission's Rules,* 59 RR 2d 1418, 1434-35 (1986).

3 In addition, the Commission confirmed again that the Act opens all pro-competitive entry strategies to competitors, allowing them to choose among these strategies as they see fit. *See, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3910-13, ¶¶ 483-89 (1999)("*UNE Remand Order*").

4 *Id.* at ¶ 484.

5 *Id.*

The Commission also clarified that requesting carriers may obtain and use EELs, explaining that requesting carriers are permitted to order this combination under the ILECs' special access tariffs, and convert the pre-existing combination to UNEs pursuant to Section 315(b) of the Commission's rules.[6]

Based upon a flurry of last-minute *ex parte* contacts from ILECs making unsupported allegations that EELs may threaten universal service, the Commission subsequently took the unusual step of issuing a *sua sponte* order imposing a restriction on the use of EELs.[7] Specifically, the Commission modified the *UNE Remand Order* less than one month after its release by permitting ILECs to deny EELs to requesting carriers unless such carriers will use them to carry a "significant amount of local exchange service." The Commission stated that this restriction would apply until final resolution of the *Fourth FNPRM*, which it assured parties would occur no later than June 30, 2000.[8]

Six months later, the Commission issued the *Supplemental Order Clarification*.[9] In this decision, the Commission recognized that the recent *CALLS Order* had removed the universal service subsidies in switched access charges.[10] Nevertheless, the Commission continued to suggest that EEL conversions implicate universal service concerns, while claiming that "a number of additional considerations" required an indefinite extension of the use

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6 *Id.* at ¶¶ 486-89.

7 *Implementation of the Local Competition Provisions of the Telecommunications* Act, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) at ¶ 6. ("*Supplemental Order*").

8 *Id.* at ¶ 2.

9 On June 23, 2000, CompTel filed the instant appeal of the *Supplemental Order Clarification*, FCC 00-183, released by the Commission on June 2, 2000 in the proceeding captioned *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 ("*Supplemental Order Clarification*").

10 *Id.* at ¶ 8.

restriction on EELs. Specifically, the Commission held that it needed more time to "gather evidence on the development of the marketplace for exchange access in the wake of the new unbundling rules adopted in the [*UNE Remand Order* to] determine the extent to which denial of access to network elements would impair a carrier's ability to provide special access services."[11] The Commission also claimed that an extension would give the Commission and the parties "more time to evaluate the issues raised in the record in the *Fourth FNPRM*"[12]; and it would avoid an "immediate transition to unbundled network element-based special access [that] could undercut the market position of many facilities-based competitive access providers."[13] The Commission also sought to provide more specificity on the nature and scope of the "significant amount of local exchange service" standard. Accordingly, the Commission held that a requesting carrier must satisfy one of three complex options before it could obtain an EEL from an ILEC and use it to provide telecommunications services.[14] The result is that a relatively simple use restriction intended to last for approximately six months became a complex set of restrictions with a life of their own.

Ever since issuing the *UNE Remand Order*, the Commission has charted a tortuous path towards ever more complicated use restrictions on EELs with increasingly vague and remote policy justifications. The Commission needs to return immediately to the path charted by Congress when it drafted Section 251 – no use restrictions on UNEs. As it is now evident to the Commission and the industry alike that EEL restrictions have no discernible tie to universal service, the only purpose served by EEL restrictions in today's market is to protect a

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11 *Id.* at ¶ 16.

12 *Id.* at ¶ 17.

13 *Id.* at ¶ 18.

14 *Id.* at ¶ 22.

monopoly revenue stream for the ILECs. This is a patently illegal policy. The ILECs have had more than five years since passage of the 1996 Act to get used to the reality of UNE combinations such as EELs, and the ILECs have had approximately eighteen months since the *UNE Remand Order* to adjust for the loss of special access revenues due to EEL conversions. The Commission must remove all EEL restrictions and do so immediately to promote telecommunications competition as intended by Congress.

I. USE RESTRICTIONS ARE UNNECESSARY AND WOULD NOT SERVE THE PUBLIC INTEREST

There is no rational public policy basis for imposing restrictions on the use of EELs. The use restrictions are not necessary to protect universal service, because there are no universal service support subsidies in special access (or even switched access) rates. The only effect of the use restrictions is to guarantee the ILECs a certain revenue stream from their tariffed special access services. However, protecting ILEC revenues is not a permissible policy objective for the Commission. Moreover, use restrictions are fundamentally inconsistent with the Commission's application of the impair standard, as well as its competitive policies. Certainly, the Commission cannot deny that the practical effect of its EEL restrictions has been to ensure that EELs are largely unavailable to requesting carriers for the past eighteen months. For these reasons, the Commission should immediately lift the use restrictions it imposed on an "interim" basis in the *Supplemental Order* and extended indefinitely in the *Supplemental Order Clarification.*

A. There Is No Universal Service Support In Interstate Access Charges.

The Commission's primary justification for extending the "interim" use restrictions in the *Supplemental Order Clarification* was its desire to preserve the special access

issue raised in the *Fourth FNPRM*. Specifically, the Commission claimed that "allowing use of combinations of unbundled network elements for special access could undercut universal service by inducing IXCs to abandon switched access for unbundled network element-based special access on an enormous scale."[15] However, there are no universal service subsidies built into the rates for special access (or even switched access) services.

The Commission has *never* prescribed specific rate elements for the ILECs' special access services, nor has it established any universal service support mechanisms in its special access orders.[16] To the contrary, ILECs have always enjoyed considerable flexibility in determining the pricing of individual special access products and services, provided an overall revenue requirement was met, without any built-in subsidies to support universal service. Of course, this flexibility was intended to enable ILECs to *lower* rates in response to "competitive pressures." To CompTel's knowledge, the Commission's primary motivation in special access policies has been to reduce special access rates closer to cost, not to keep them artificially high. The Commission has already found, and the ILECs themselves have agreed, that there are no universal service subsidies in special access rates, as CompTel demonstrated in its earlier comments in this proceeding.[17]

With respect to switched access services, the Commission removed universal service support from switched access rates a few days before it released the *Supplemental Order Clarification*. Specifically, as required by Section 254(e) of the Act, the Commission removed all implicit subsidies from the interstate access charge system and replaced them with a new

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15 *Id.* at ¶ 7.

16 *Access Charge Reform*, 14 FCC Rcd 14221, ¶ 8 (1999) (*Access Reform Fifth Order*).

17 Comments of the Competitive Telecommunications Association, CC Docket No. 96-98 (filed January 19, 2000) at 4-8.

interstate access universal service support mechanism in the *CALLS Order*.[18] The Commission has described the *CALLS Order* as a comprehensive approach to resolving outstanding issues concerning access charges and universal service.[19] Thus, the *CALLS Order* eliminated the only rationale relied on by the Commission when it adopted the use restriction in the *Supplemental Order*: concern about impact of EELs on universal service "prior to full implementation of access charge and universal service reform."[20]

B. The Use Restrictions Serve Only To Preserve a Supra-Competitive Revenue Stream for the ILECs and Protect Inefficient Competitive Access Providers.

In the *Supplemental Order Clarification*, the Commission speculated that EELs might undermine universal service support built into switched access rates by creating incentives for carriers to migrate from switched access configurations to EELs.[21] However, that concern does not have even theoretical validity because there are no longer any significant implicit

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18 *Access Charge Reform*, 15 FCC Rcd 12962, 12964, ¶ 3 (2000) ("*CALLS Order*").

19 *Id.* at 12974, ¶ 28; *see also Modified CALLS Proposal* at 22, ¶ 6 ("The signatories agree that this proposal, without modification, is a fair and reasonable compromise plan to resolve issues relating to access and universal service for price cap LECs."). *See also First CALLS Memorandum* at 27 ("This proposal, taken as a whole, achieves statutory universal service goals for this five year period.").

20 *Supplemental Order* at ¶¶ 2,7. Although it is true that the Commission has not completed access reform for rate of return regulated ILECs, this cannot justify keeping the current "interim" EEL restrictions, which apply to price cap ILECs as well. Further, there is no empirical basis in this proceeding for concluding that the special access rates of rate of return regulated ILECs have any universal service component, nor is there any evidence that eliminating this restriction would undermine the universal service support (to the extent there is any, which CompTel doubts) in the switched access rates of such ILECs. CompTel would note that the Commission currently is considering a proposal in CC Docket No. 96-262 to institute comprehensive reform of these ILECs, which further lessens the need for any UNE restrictions applicable to rate of return regulated ILECs.

21 *Id.* at ¶ 7.

subsidies in switched access rates.[22] Thus, the only effect of the EELs restriction is to protect the ILECs' special access revenue stream from competitive market conditions. However, the Commission itself has recognized that the protection of ILECs' revenues is not a legitimate policy objective under the 1996 Act.[23] Even before the 1996 Act, both the Commission and the Court of Appeals for the District of Columbia observed that "the goal of the agency 'is to promote competition . . . not to protect competitors.'"[24]

Further, there is no longer any need (if there ever was) to give the ILECs a transition period in order to adapt to the loss of revenues from supra-competitively priced special access services. The ILECs have already had over five years since passage of the 1996 Act – and 18 months since the *UNE Remand Order* – to adjust to a lesser revenue stream. These time periods are a more than generous transition period for the ILECs.[25] Under similar circumstances

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22 The amount of traffic that migrates from switched access to special access is irrelevant because there are no universal service subsidies in switched access rates. However, even if there still were implicit subsidies in switched access rates, the steep reduction in per-minute charges under CALLS reduces the incentives to migrate from switched access to special access. Accordingly, there is no empirical data of any kind to support speculation that unrestricted use of EELs will harm universal service through a migration of traffic from switched access to special access. Given that special access rates have been declining for a decade with no apparent harm to universal service, this empirical evidence obviously cannot be assumed.

23 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 725 ("*Local Competition Order*"), *aff'd in part, vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) ("The fact that access or universal service reform have not been completed by that date would not be a sufficient justification [for extending the use restriction], *nor would any actual or asserted harm to the financial status of the incumbent LECs.*") (emphasis added).

24 *CompTel v. FCC* at 530, *quoting WATS-Related and Other Amendments of Part 69 of the Commission's Rules,* 59 RR 2d 1418, 1434-35 (1986).

25 The ILECs do not need financial protection, particularly in comparison with competitive carriers. *See, e.g.,* Vikas Bajaj, *Critics Call Telecom War an Unfair Fight*, DALLAS MORN. NEWS, <http://www.dallasnews.com/cgi-bin/print.cgi?story=http://www.dallasnews.com/technology/314675_babybells_18bu.html> (Mar. 18, 2001).

where the Commission claimed that it had "proceeded with caution" in order to "minimize rate shock for customers" and "impose the least burden upon the smallest competitors," the Court of Appeals for the District of Columbia held that the Commission had failed to justify the need to protect a subsidy that IXCs paid to ILECs.[26]

In addition to being unnecessary, protection of the ILECs' high special access rates actually destabilizes emerging competition in the special access market segment. The Commission recently granted several petitions for flexibility in the pricing of access services by certain ILECs.[27] These ILECs can now cross-subsidize their special access services subject to pricing flexibility where they face competition using revenue from high special access rates where they face no competition. Thus, the Commission has created the incentive and the ability for ILECs to engage in anti-competitive price discrimination through its use restrictions.

The impropriety of protecting ILEC revenue streams through use restrictions is highlighted by the Commission's decision not to protect the revenue streams of new entrants in other proceedings.[28] For example, the Commission is currently considering rules that would drastically curtail reciprocal compensation revenues for some CLECs in response to sustained challenges by the ILECs.[29] Similarly, the Commission is currently considering rules that would

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26 *Id.* at 529-32.

27 *See, e.g., BellSouth Petition for Phase I Pricing Flexibility for Switched Access Services*, CCB/CPD No. 00-21, FCC 01-76 (rel. Feb. 27, 2001); *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 00-20, DA 00-2793 (Rel. Dec. 15, 2000); *Petition of Ameritech Indiana, Ameritech Michigan, Ameritech Ohio, and Ameritech Wisconsin for Pricing Flexibility; Petition of Pacific Bell Telephone Company for Pricing Flexibility; Petition of Southwestern Bell Telephone Company for Pricing Flexibility*, CCB/CPD Nos. 00-26, 00-23, 00-25, DA 01-670 (rel. March 14, 2001).

28 *See, e.g., Access Charge Reform*, 14 FCC Rcd 14221 (1999).

29 *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 99-68 & 96-96.

result in lower interstate access charge revenues for some CLECs.[30] Given those ongoing proceedings, it is indefensible for the Commission to insulate the ILECs' special access revenues from the market-opening provisions of the 1996 Act.

It is equally indefensible for the Commission to suggest that supra-competitive ILEC special access rates may be necessary as a pricing umbrella for inefficient CLECs. In the *Supplemental Order Clarification*, the Commission claimed that an "immediate transition to unbundled network element-based special access could undercut the market position of many facilities-based competitive access providers."[31] However, obtaining EELs at cost-based rates can hardly deter efficient entry and investment by ILECs or CLECs, or even artificially undercut the market position of any carrier group. As the Commission has repeatedly recognized, setting unbundled network element prices based on TELRIC encourages efficient levels of investment and entry by both competitive carriers and incumbent LECs.[32] In the words of the Commission,

> "In dynamic competitive markets, firms take action based . . . on the relationship between market-determined prices and forward-looking economic costs. If market prices exceed forward-looking economic costs, new competitors will enter the market. If their forward-looking economic costs exceed market prices, new competitors will not enter the market *and existing competitors may decide to leave*. Prices for unbundled elements under section 251 must be based on costs under the law, and that should be read as requiring that prices be based on forward-looking economic costs. New entrants should make their decision whether to purchase

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30 *See, e.g., Common Carrier Bureau Seeks Additional Comment on Issues Relating to CLEC Access Charge Reform*, Public Notice, DA 00-2751, CC Docket No. 96-262 (rel. Dec. 7, 2000).

31 *Supplemental Order Clarification* at ¶ 18.

32 *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, ¶¶ 49-50 (1999), *citing Local Competition First Report and Order*, 11 FCC Rcd 15499, 15813, ¶ 620.

> unbundled elements or to build their own facilities based on the relative economic costs of these options."[33]

Therefore, obtaining EELs at cost-based rates will not undercut the market position of any efficient competitors, and there is no legitimate policy basis for protecting the entrenched market position of inefficient carriers.

Lastly, CompTel urges the Commission to take this opportunity to promulgate a broader interpretation of its current rule on UNE combinations in Section 51.315(b) of its Rules. As CompTel and other parties have argued previously in this proceeding,[34] and as the Commission itself held in the *Local Competition First Report and Order*,[35] the prohibition on an ILEC's separation of UNEs that it "currently combines" can and should be read to apply to any UNEs which the ILEC normally or typically combines in its network. Such an interpretation would eliminate the current obstacle of having carriers first order the EEL functionality as a tariffed special access service and then convert the service as a pre-existing combination to an EEL. This cumbersome process not only adds cost and delay to the process of obtaining EELs, it affords the ILECs yet another opportunity to thwart EELs altogether by refusing to provision the special access services in a timely manner or to convert existing services to EELs. In the *UNE Remand Order*,[36] the Commission declined out of an excess of caution to address this matter because related rules were under review in appeals that were pending at the time before the U.S. Court of Appeals for the Eighth Circuit. Given that the Eighth Circuit ruled in that case last

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33 *Local Competition First Report and Order*, 11 FCC Rcd at 15813, ¶ 620.

34 *E.g.*, Petition for Reconsideration, filed by CompTel, CC Docket No. 96-98, filed Feb. 17, 2000, at 10-14.

35 *Local Competition First Report and Order*, 11 FCC Rcd at 15648, ¶ 296.

36 *UNE Remand Order*, 15 FCC Rcd at 3908-09, ¶ 479.

year,[37] the time is now ripe for the Commission to clarify the proper scope of Section 51.315(b) to remove the impediments to competitive entry posed by the unduly narrow interpretation of the rule which prevails today.

C. Use Restrictions Are Inconsistent With The Goals of the Act and of the Commission.

The goals that the Commission articulated in the *Supplemental Order* and *Supplemental Order Clarification* to justify EELs restrictions are inconsistent with FCC policies. In particular, use restrictions are contrary to the Commission's policies on creating incentives for competition. Indeed, the principle upon which TELRIC pricing is based is that "new entrants should make their decisions whether to purchase UNEs or build their own facilities based on the relative economic costs of these options."[38] The Commission established TELRIC pricing in order to ensure that the 1996 Act is implemented in a manner that is "pro-competition" rather than "pro-competitor."[39] The Commission forgot that fundamental lesson when it adopted EEL restrictions to bestow monetary benefits upon the ILECs.

The Commission recognized that if ILECs were allowed to charge rates that exceed TELRIC, new entrants' investment decisions would be distorted, and would lead to inefficient entry and investment decisions.[40] However, the Commission conceded in the *Supplemental Order Clarification* that special access rates exceed TELRIC-priced UNE rates, otherwise the use restrictions would be unnecessary. Because use restrictions on EELs protect above-TELRIC pricing of certain network functionalities, the Commission's policy has quite

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37 *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000).

38 *Id.*

39 *Id.* at ¶ 618.

40 *See id.* at ¶ 620.

possibly already induced inefficient investment by sending distorted pricing signals to the industry. As a result, the Commission's EELs restrictions have violated bedrock Commission policies regarding the need for cost-based pricing of wholesale inputs in order to maximize consumer welfare under the Communications Act of 1934.

It also bears emphasis that the Commission's UNE use restrictions are inconsistent with the impair standard that the Commission adopted and applied in the *UNE Remand Order* only 18 months ago. In applying the impair standard, the Commission stated that it would consider the following factors: (1) rapid introduction of competition in all markets; (2) promotion of facilities-based competition, investment, and innovation; (3) reduced regulation; (4) certainty in the market; and (5) administrative practicality.[41] The restrictions on EELs imposed in the *Supplemental Order* and extended in the *Supplemental Order Clarification* are contrary to each of the five factors identified by the Commission. In particular, the EEL restrictions (1) significantly decrease the speed with which competition is introduced in all markets; (2) interfere with efficient facilities-based competition; (3) significantly increase the regulation that both ILECs and competitive carriers face; (4) reduce certainty in the market; and (5) are not practical from an administrative standpoint.

The past 18 months have demonstrated that restrictions on the use of EELs have decreased the speed with which competition is introduced and reduced certainty in all markets, because the restrictions have led to disputes about whether a competitive carrier meets the qualifications and emboldened many ILECs to refuse to provide EELs to any requesting carriers. Disputes over the requirements for the use restrictions began immediately after the *Supplemental Order*. Paradoxically, those disputes led the Commission to adopt a more complex, less

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41 *UNE Remand Order* at 3745-50, ¶¶ 101-116.

understandable "clarification." Unfortunately, that "clarification" actually has led to even more disputes between ILECs and competitive carriers. The result has been that few carriers have been able to integrate EELs into their business plans, even if they provide a "significant amount of local exchange service." Moreover, entry is delayed because carriers do not have accurate information about the availability of EELs. Certainly, carriers who do not propose using EELs to provide "a significant amount of local exchange service" are impeded because they are denied EELs under the Commission's policy. Given the speed with which technology and service offerings evolve, there is nothing that the Commission could do to lessen the uncertainty that the service-specific use restrictions cause apart from immediately lifting them altogether.

The Commission's use restrictions also interfere with facilities-based competition because they create incentives for inefficient entry and investment. The EEL restrictions force an entrant to choose between investing in unnecessary facilities in order to obtain a cost benefit compared to supra-competitive special access rates, or simply paying excessive special access rates to the ILECs and investing fewer resources in other aspects of its business model. Either way, the outcome is sub-optimal from the perspective of competition and economic welfare. Further, a carrier may change its business plan to minimize the use of extended loops because it cannot purchase that functionality at cost-based rates in the market today. Simply put, the Commission's use restrictions interfere with the efficient investment decisions that carriers would make if UNEs were available, as Congress required, to use in the provision of any telecommunications services.

The Commission's use restrictions also have increased significantly the regulation that competitive carriers face. The current "interim" restrictions are so complex that by comparison the Internal Revenue Code looks simple. The Commission's order "clarifying" this

policy is over four times longer than the order originally imposing the restrictions. Further, the so-called clarification has done nothing but generate confusion, delay and uncertainty. Even today the parties cannot agree on the precise meaning of any of the three options specified by the Commission as rendering an entrant qualified to receive an EEL. Parties are spending resources litigating these options that could be better spent entering the market and competing against the ILECs. Even when one of these options is satisfied, there is an enormous regulatory cost, as carriers must modify their research and market planning operations, add a series a questions to the list that sales personnel must ask potential subscribers, and implement a monitoring system to determine continued compliance, particularly because ILECs have the right to "audit" a carrier's use of EELs to determine whether the carrier meets the requirements. Thus, the EEL restrictions are an administrative nightmare that undermine the ability of CLECs to use UNEs to provide telecommunications services to subscribers.

The use restrictions are also simply not practical from an administrative standpoint. Perhaps the biggest problem is that all three options focus on factors that are beyond the ability of the CLEC (and for some options, even the customer) to control or to know. Even if a CLEC meets the criteria and qualifies for an EEL, the customer may subsequently fall below the requisite threshold without its or its customer's knowledge. In that case, the CLEC would no longer qualify for the EEL and it could be forced to pay a penalty to the ILEC in the form of back-billed special access rates. Indeed, it may even be at risk of "losing" the EEL and suffering an interruption in service for its customer should the ILEC seek to punish the carrier for falling out of compliance with the requisite thresholds. This type of business uncertainty is an enormous barrier to entry for competitive telecommunications providers. As a regulatory

regime, it is reckless and illegal to adopt a system that imposes monetary *penalties* on carriers based on factors that are outside the ability of the carriers to control or even know.

II. USE RESTRICTIONS VIOLATE THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE 1996 ACT

We have shown above that EEL restrictions serve no rational public policy purpose. However, the Commission need not even undertake such an inquiry because, as we show below, such restrictions are contrary to the market-opening provisions of the 1996 Act. Even if the Commission could identify a legitimate public purpose that these restrictions would promote (and we submit it cannot), it could not adopt these restrictions because they are contrary to the statute.

Use restrictions on UNEs are inconsistent with the plain language of the statute. The statute defines a "network element" as a "*facility or equipment* used in the provision of a telecommunications service . . . includ[ing] features, functions, and capabilities that are provided by means of such facility or equipment."[42] Section 251(c)(3) imposes upon ILECs the "duty to provide" access to network elements "to *any* requesting telecommunications carrier for the provision of *a telecommunications service*."[43] Section 251(d)(2) in turn requires the

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42 47 U.S.C. § 153(29) (emphasis added).

43 *See* 47 U.S.C. § 251(c)(3) (emphasis added). Section 251(c)(3) of the 1996 Act imposes upon ILECs:

> The duty to provide, *to any requesting telecommunications carrier for the provision of a telecommunications service*, nondiscriminatory access to network elements on an unbundled basis *at any technically feasible point* on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements *in a manner that allows requesting carriers*

(continued...)

Commission to determine which particular network elements ILECs must make available "for the purposes of section 251(c)(3)," that is, "for the provision of a telecommunications service." Therefore, the statute expressly requires the Commission to unbundle the network on an element-by-element basis and the ILECs to provide access to these unbundled network elements to "*any* requesting telecommunications carrier" so long as the carrier uses the network element to provide "a telecommunications service." There is no basis in the statute for conditioning access to network elements based on the type of telecommunications service that the requesting carrier will provide using the network element.

The Commission reached this same conclusion in the *Local Competition Order*, which it reaffirmed in the *Third Report and Order* of 1999. In the *Local Competition Order*, the Commission held that the statute "permits interexchange carriers and all other requesting carriers, to purchase unbundled elements for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers."[44] The Commission explained that access to unbundled network elements cannot be conditioned upon the requesting carrier offering local service to its customers because "the plain language of Section 251(c)(3) does not obligate carriers purchasing access to network elements to provide all services that an unbundled element is capable of providing or that are typically provided over that element" or "impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements."[45]

(...continued)

to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3) (emphasis added).

44 *Local Competition Order* at ¶ 356; *UNE Remand Order* at ¶ 484.

45 *Local Competition Order* at ¶ 264.

The Commission's conclusion that the statute forbids usage restrictions follows naturally from the statutory definition of "network element." The Act defines the term "network element" as:

> "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."

Importantly, this definition is based on facilities and equipment that can be used to provide telecommunications services rather than on the telecommunications services themselves. As the Commission has explained, "network elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services."[46] "[W]hen interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access 'service'" or any other particular "service."[47] Instead, the carriers are purchasing access to a functionality that can be used to provide a service when combined with other elements and/or functionalities. Therefore, once a carrier purchases access to an element, the carrier can use that element at its, and its customer's, discretion to provide any service the element is capable of supporting.[48]

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46 *Id.*

47 *Id.* at ¶ 358.

48 In the *Supplemental Order Clarification,* the FCC claims that it adopted a use restriction on shared transport in the *Local Competition Third Order on Reconsideration. See Supplemental Order Clarification* at ¶ 3. However, in the *Local Competition Third Order on Reconsideration*, the FCC specifically stated that it was not adopting a use restriction, but rather recognizing how the network element would be utilized in practice. Moreover, the FCC has not yet adopted a final rule on this issue. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 12460, 12494-96, ¶¶ 60-61. In any event, to the extent that the FCC's previous ruling is a use restriction, it is unlawful and subject to reversal on appeal.

Use restrictions are fundamentally inconsistent with the statutory definition of "network element" because they focus on marketplace conditions regarding a "service" that can be provided using a particular facility or equipment rather than the availability in the marketplace of the facility or equipment itself. If Congress had intended the Commission to adopt use restrictions, it would have defined the term "network element" as "a telecommunications service provided using a facility or equipment." Instead, Congress intended the Commission to focus on the availability in the marketplace of "a facility or equipment used in the provision of a telecommunications service," regardless of the specific type of service for which the requesting carrier will use that facility or equipment to provide.

The Commission codified its conclusion that the Act does not permit usage restrictions in Rule 51.309(a), which provides that an "incumbent LEC shall not impose limitations, restrictions, or requirements on request for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends."[49] Similarly, Rule 51.307(c) requires ILECs to provide UNEs "in a manner that allows the requesting carrier to provide any telecommunications carrier to provide *any telecommunications service that can be offered by means of that network element.*"[50] The Commission found that its conclusion not to impose restrictions on the use of unbundled network elements was "compelled

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49 47 C.F.R. § 51.309(a). As the FCC noted in the *UNE Remand Order*, Rule 51.309(a) was not challenged in court by any party. *UNE Remand Order* at ¶ 485. The FCC further adopted Rule 51.307(b), which provides that a "telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers." 47 C.F.R. § 51.309(b).

50 47 C.F.R. § 51.307(c) (emphasis added). Rule 307's emphasis on "any telecommunications service capable of being offered" underscores that carriers are free to use UNEs in ways that differ from the ILECs' classifications, and even to substitute for other services provided by an ILEC.

by the plain language of the 1996 Act" because exchange access and interexchange services are "telecommunications services."[51] The Commission emphasized that "there is no statutory basis by which we could reach a different conclusion,"[52] because the statutory language is "not ambiguous."[53]

It is well established that where "Congress has directly spoken to the precise question at issue," the Commission "must give effect to the unambiguously expressed intent of Congress."[54] Here, Congress has spoken to the precise question at issue: Can the Commission impose use restrictions on the availability of unbundled network elements? Congress unambiguously expressed its intent that use restrictions are prohibited, as the Commission itself has repeatedly found. The statute's only requirement is that an unbundled network element, which the statute defines as a facility or equipment, be used in "the provision of a telecommunications service." Therefore, the unambiguously expressed intent of Congress must be given effect by prohibiting all use restrictions.[55]

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51 *Local Competition Order* at ¶ 356; *UNE Remand Order* at ¶ 484.

52 *Local Competition Order* at ¶ 356.

53 *Id.* at ¶ 359.

54 *See, e.g., AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000), *quoting Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

55 The Commission cannot rely on Section 154(i) standing alone to adopt a use-based restriction. It is well established that the Commission has no authority to promulgate regulations contrary to express statutory provisions. *See* 47 U.S.C. § 154(i) (the Commission "may perform any and all acts . . . not inconsistent with this Act"); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 201 (1956) ("§ 154(I) . . . grant[s] general rulemaking power not inconsistent with the Act or law"). Because Section 251(c)(3) mandates that interexchange carriers be allowed to purchase unbundled network elements in order to provide any telecommunications service, including exchange access, the Commission has no authority to rely on Section 154(i) by itself to adopt use-based restrictions. Finally, the Commission cannot forbear from applying Section 251(c)(3) in order to adopt a use-based restriction because Section 251 has not been fully implemented. *See* 47 U.S.C. § 160(d) ("[T]he Commission may not forbear from applying the requirements of section 251(c) . . . until it determines that those requirements have been fully implemented.).